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Court/Tribunal: World Trade Organization Dispute Settlement Panel

Case: China – Measures Related to the Exportation of Various Raw Materials

Date: August 31, 2010

Note: Abstract based on Reports of the Panel

Written By: Yuan Shen

Background History & Procedural Posture

This World Trade Organization (“WTO”) report was issued by a dispute settlement panel (“Panel”) formed pursuant to a November 4, 2009 request by the United States (“US”), the European Communities¹ (“EU”) and Mexico (“Complainants”). The basis of the request was that the People’s Republic of China (“Respondent”) violated certain provisions of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and the Protocol on the Accession of the People’s Republic of China (“Protocol”). The US, Mexico, and the EU argued that China’s restraints on the exportation of certain forms of raw materials violated portions of the Protocol, GATT 1994, and the Report of the Working Party on the Accession of China (“Working Party Report”). These exporting restraints include the following: export duties, export quotas, export licensing, and minimum export price requirements. Complainants also challenged the allocation and administration of export quotas, export licenses and minimum export prices, and the alleged non-publication of certain measures.

Arguments

China argued that the temporary export duties applied to fluorspar were justified pursuant to Article XX(g) of GATT 1994. Additionally China argued that the temporary export duties on certain kinds of raw material were justified pursuant to Article XX(b) of GATT 1994. China also argued that the export quota applied to refractory-grade bauxite was justified pursuant to Article XI:2(a) of GATT 1994, or was otherwise justified pursuant to Article XX(g) of GATT 1994, and that the export quotas applied to coke and silicon carbide were justified pursuant to Article XX(b) of GATT 1994.

Holdings & Reasoning

The Panel first denied China’s request to consider China’s new exporting regulatory measures that were applied in 2010, after the establishment of the Panel, instead of its prior exporting regulatory measures that were contained in the original complaint, but that had been terminated at the end of 2009. The Panel stated that panels shall have standard terms of reference unless the Complainants and Respondent agree otherwise. These standard terms of reference are to examine the matter referred to the Dispute Settlement Body “by the complainant in the request for establishment and to make such findings as will assist the DSB in making recommendations.” Therefore, the Panel only had power to consider

¹ On 1 December 2009, the European Union replaced and succeeded the European Community.

the consistency of measures taken by China on 21 December 2009, before the establishment of the Panel. Second, the Panel considered whether certain exporting duties were inconsistent with Paragraph 11.3 of the Protocol. The Panel found that the Paragraph 11.3 of the Protocol requires China to “eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of GATT 1994.” However, these raw materials in dispute are not included in Annex 6 of China's Accession Protocol, with the exception of yellow phosphorus. Therefore, exporting duties imposed on these raw materials, except yellow phosphorus, were inconsistent with Paragraph 11.3 of the Protocol.

The Panel further denied China's argument that certain exporting duties were justified pursuant to Article XX of GATT 1994. The Panel stated that Paragraph 11.3 of the Protocol does not include any express reference to Article XX of GATT 1994 or to provisions of GATT 1994, nor does it include an introductory clause to incorporate Article XX of GATT 1994. The language of Paragraph 11.3 of the Protocol expressly states that China can justify exporting duties only pursuant to Article VIII. The Panel believed that if a defense under Article XX is available, then the language of Paragraph 11.3 of the Protocol would expressly mention that.

Third, the Panel considered whether exporting quotas of certain raw materials were inconsistent with Article XI:1 of GATT 1994. Article XI: 1 generally forbids import and export restrictions or prohibitions though quotas. The panel held that the respondent had the burden to demonstrate that the exporting quotas were justified pursuant to Article XI: 2 or Article XX of GATT 1994. Therefore, the Panel held that unless China could demonstrate that the exporting quotas met the conditions of Article XI: 2 or Article XX, the exporting quotas were inconsistent with GATT 1994.

The Panel denied China's argument that exporting quotas of refractory-grade bauxite was justified pursuant to Article XI: 2(a). The Panel held that Article XI: 2(a) permits temporary restrictions or prohibitions to address critical shortages of “products essential to the exporting contracting party.” The Panel further held that a product may be essential within the meaning of Article XI: 2(a) “when it is ‘important’ or ‘necessary’ or ‘indispensable’ to a particular Member.” A product that is an input to an important product or industry may be considered as an essential product. The term “critical shortages” in Article XI: 2(a) refers to “those situations or events that may be relieved or prevented through the application of measures on a temporary, and not indefinite or permanent, basis.” In this case, refractory-grade bauxite was an essential product because it is an intermediate product in the production of iron and steel in which China is the leading producer in the world. However, China's exporting restriction was a part of a long-term conservation plan and, thus, was not temporary. Further, China's estimation of a sixteen-year reserve for bauxite indicated that the “critical shortage” could not be relieved though these exporting restrictions. Therefore, China's exporting quota could not be justified under Article XI: 2.

The Panel also denied China's argument that the export duties and export quotas applied to refractory-grade bauxite and fluorspar were justified pursuant to

Article XX(g) of GATT 1994. The Panel held that exporting measures can be justified under Article XX(g) only if the measures “relate to the conservation” of an exhaustible natural resource and “are made effective in conjunction with domestic restrictions on production or consumption.” There must be a substantial relationship between the export measures and conservation. Parallel domestic restrictions should be applied jointly with the export restrictions. Additionally, the purpose of the export restrictions must be to ensure the effectiveness of the domestic restrictions. In this case, China did not sufficiently demonstrate the relationship between the export quota and the goal of conservation. The Panel also could not find parallel domestic restrictions. Therefore, China’s exporting measure could not be justified under Article XX(g).

The Panel denied China’s argument that certain exporting measures were justified pursuant to Article XX(b). The panel held that a measure cannot be justified under Article XX(b) unless the measure is “necessary to protect human, animal or plant life or health” and also that it “comply with the chapeau of Article XX.” Several factors should be considered to determine the justification under Article XX(b) including the importance of the interests or values at issue, the contribution of the measure to the objective pursued, the trade restrictiveness of the measure, and the availability of WTO-consistent or less trade restrictive alternative measures.

Here, the Panel did not find any environmental or health concerns related to the export restrictions, or they were part of a comprehensive program maintained to reduce pollution. Next, the Panel held that China’s evidence failed to prove the exporting restriction had a material contribution to environmental protection. Further, the Panel held that these restrictions had an important impact worldwide. Finally, the Panel held that China failed to show why some less trade restrictive and WTO-consistent alternatives available could not be used instead of applying export restrictions. Therefore, the Panel held that China failed to justify its exporting restrictions under Article XX(b).

Fourth, the Panel considered whether prior export performance and a minimum capital requirement to obtain a quota allocation contravenes Paragraphs 1.2, 5.1 and 5.2 of the Protocol, read in combination with Paragraphs 83 and 84 of the Working Party Report. These provisions of the Protocol state that within three years after accession, all enterprises in China shall have the right to export goods, and foreign individuals and enterprises should have no less favorable treatment. China also promised to eliminate any export performance and prior experience requirements for both Chinese and foreign-invested enterprises. The Panel held that these requirements should be eliminated based on the provisions above. Therefore these requirements were inconsistent with Paragraphs 1.2 and 5.1 of the Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d), and Paragraphs 84(a) and 84(b) of the Working Party Report.

With respect to Paragraph 5.2 of the Protocol, the Panel held that China did not violate that provision. Paragraph 5.2 of the Protocol requires no less favorable treatment to foreign individuals and enterprises. Since both domestic and foreign individuals and enterprises were required to meet those requirements, no disfavor or discriminatory treatment was found.

The Panel further held that China's administration of its export quotas by assessing the capacity of quota applicants to determine the allocation of a quota is inconsistent with Article X: 3(a) of GATT 1994. Article X: 3(a) requires a member of the WTO to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings." The Panel held that China's administration of its export quotas was included in the meaning of "administer." In the Panel's view, China's system of quota allocation had an undefined and vaguely worded criterion which could trump all other criteria. This criterion was applied by thirty-two different regional offices without clear guidelines. "The lack of any definition, guidelines or standards to guide how the operation capacity criterion should be applied poses a very real risk to the interests of relevant parties" and will result in unreasonable and non-uniform administration of this criterion. Therefore, China's administration of its export quotas was inconsistent with Article X: 3(a).

However, the Panel believed that China's administration of its export quotas through the involvement of the China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCC MC") was consistent with Article X: 3(a) of GATT 1994. First, the Panel found that Members of the CCC MC Secretariat did not participate in deciding which applicant exporters were awarded a part of the export quota. Therefore, it was impossible for them to affect the partial administration of the quotas. The Panel also found that "the required documents were relevant to the discharge of the task delegated to the CCC MC Secretariat to verify the eligibility of quota applicants." Thus, information in these documents was not confidential business information and the requirement to provide these documents was reasonable.

The Panel nevertheless held that China's failure to publish the total amount of zinc and the procedure for its allocation export quotas was inconsistent with Article X:1 of GATT 1994. Under Article X:1, WTO members are required to promptly publish all laws, regulations, judicial decisions and administrative rulings to allow governments and traders to become acquainted with them. China's failure to publish export quotas of zinc violated Article X:1 of GATT 1994.

Next, the Panel stated that China's allocation of quotas on bauxite, fluorspar and silicon carbide based on the bid-winning price was consistent with Article VIII:1(a) of GATT 1994 and Paragraph 11.3 of the Protocol. Article VIII:1(a) prohibits all fees and charges that are "imposed on or in connection with exportation" and that are not "limited in amount to the approximate cost of that service rendered." The Panel found that China's bid-winning price with quota allocation was not a fee or charge imposed on or in connection with exportation, or imposed in exchange for a service rendered. The price was determined and assigned to the applicant enterprise well before the exporter entered into a binding commitment to export the good subject to a quota. It was a price for a future return, but not for a service, so the bid-winning price was not a "charge applied to exports" that falls within the scope of Paragraph 11.3 of the Protocol.

The Panel also stated that China's export licensing system on certain raw materials was inconsistent with Article XI:1 of GATT 1994. Article XI:1 forbids import and export restrictions or prohibitions through export licenses. If a licensing agency has discretion to grant or deny a license based on unspecified criteria, then a licensing system is not permissible under Article XI:1. A licensing agency can require an applicant to satisfy certain prerequisites before granting an import or export license without violating Article XI:1. "The requirement to satisfy a prerequisite would be prohibited under Article XI:1 only if the prerequisite itself created a restriction or limiting effect on importation or exportation." In this case, unspecific and generalized requirements to submit an unqualified number of other documents or other materials gave the licensing agency open-ended discretion. This discretion created uncertainty as to an applicant's ability to obtain an export license. Export licensing agencies' discretion to refuse to grant an export license amounts to an additional restriction that is inconsistent with GATT Article XI:1.

The Panel further found that a requirement to export at a coordinated minimum export price constituted a restriction on exportation and was inconsistent with Article XI:1 of GATT 1994. The Panel first denied China's argument that it had removed the practice of coordinating industry prices before the Panel's establishment on 21 December 2009. The Panel then held that "a measure preventing exportation below a minimum price level inherently constitutes a 'restriction' that is inconsistent with Article XI:1." A minimum price requirement may eliminate potential buyers and keep the product in the domestic market. The potential to limit trade was sufficient to constitute a restriction "on the exportation or sale for export of any product" within the meaning of Article XI: 1 of GATT 1994.

Lastly, the Panel determined that China's failure to publish measures of its minimum price requirement administration was inconsistent with Article X:1 of GATT 1994. The *2001 CCCMC Charter* grants authority to the CCCMC, which includes the ability to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals Industries." The *2001 CCCMC Charter* is a measure that has the potential to affect the trade activities of business within the broad metals, minerals, and chemicals industries. Therefore, the 2001 CCCMC Charter is a law, regulation, judicial decision, or administrative ruling of general application within the meaning of Article X:1. China failed to publish *2001 CCCMC Charter* on the CCCMC website until well into 2009, after the request for consultations in this dispute had been made. Therefore it could not be considered as having been "published promptly" in a manner consistent with the requirements of Article X:1.